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The Medical Liability Crisis and its Impact on Patients

On January 28, President Bush called on Congress to renew efforts to protect America's patients, doctors, and hospitals from the staggering costs of runaway lawsuits by passing medical liability reform this year.

Background

For years health care providers have faced difficulty obtaining affordable medical liability coverage. The problem is now so great that patients are being deprived access to crucial medical care as hospitals and physicians find it increasingly difficult to continue offering certain services. Premium increases have jumped as much as 81 percent over the last two years, according to some insurers.[1] These cost increases are attributed to an overly expensive litigation system – a system that is slow, unpredictable, largely random and standardless.[2]

Liability premium rates are highest for neurosurgery, cardiovascular surgery, and obstetrics and gynecology (ob/gyn). However, many other medical disciplines, such as internal medicine and general surgery, also are reporting significant premium increases. Hospitals, physicians, and other providers of care have been calling for liability reform to help reduce these increased costs so they may continue offering vital medical care for patients and their families. More than thirty states have enacted some type of limitation on the amount of damages that can be awarded.[3] However, these measures vary in their degree of effectiveness, compounded by the fact that some state constitutions prohibit legislatures from imposing limits on damages. For instance, the Arizona Constitution states, "The right of action to recover damages for injuries

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[1]Hospitals and Health Networks, April 2002.

[2]"Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing Our Medical Liability System," U.S. Department of Health and Human Services, July 24, 2002.

[3]"Medical Malpractice Liability Reform: Legal Issues and Fifty-State Survey of Caps on Punitive Damages and Noneconomic Damages," Congressional Research Service, January 16, 2003. Does not include recent state legislative activity.

shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."[4]

The California Experience

During the1970s, the medical malpractice insurance market faced a crisis nationwide. Increasing medical injury claims and rising jury awards forced many commercial insurers to deem the practice of medicine an uninsurable risk.[5]

Health care providers and insurance carriers in California were particularly hard-hit. By the end of 1972, California carriers were paying claims in excess of $150 for each $100 collected in premiums; when operating costs were added, the loss/premium ratio rose to approximately $180 paid out for each $100 collected in premiums.[6] As a result, carriers either raised premiums further or notified physicians that their coverage would not be renewed. With the help of then Governor Jerry Brown and now Congressman Henry Waxman (who then was chairman of the Assembly's Select Committee on Medical Malpractice), the California Legislature passed the Medical Injury Compensation Reform Act of 1975 (MICRA). The MICRA law contained a number of reforms, including:

- Ensuring unlimited economic compensation for injured patients while providing up to $250,000 in non-economic damages;

- Requiring that lawsuits be filed within one year from the date that the claimant discovered the negligent act but no more than three years from the date of injury, with exceptions for cases concerning minors; and

- Allowing providers to make judgement payments over time rather than in one lump sum.

The result: over the past 25 years, California's malpractice insurance premiums rose less than compared to the rest of the country (167 percent vs. 505 percent.)[7] Such premium differences are illustrated by the fact that today California ob-gyns pay about $57,000 for liability insurance while ob/gyns in Pennsylvania, Ohio, Nevada, and Florida pay more than $100,000.[8]

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[4]Arizona Constitution, art. 18, 6.

[5]Harming Patient Access to Care: Implication of Excess Litigation. Statement of the Physician Insurers Association of America (PIAA) before the House of Representatives Subcommittee on Health, July 17, 2002.

[6]History of the Creation of MICRA, presented by Californians for Patient Protection, www.micra.org.

[7]"Confronting the New Health Crisis." endnote 69.

[8]*Medical Liability Monitor,* October 11, 2002.

The link between caps on damages and premiums is not new. In an early test, the California Supreme Court recognized this link in a 1985 ruling, noting that "the cap on non-economic damages represents an attempt to reduce the cost of medical malpractice litigation, and thereby restrain the increase in medical malpractice insurance premiums."[9]

Impact on Health Care Costs

Like all insurance premiums, medical malpractice insurance premiums are primarily determined by the insurer's cost of providing insurance and paying claims. As the number of claims rise so do the premiums which, in turn, are passed on to consumers. The General Accounting Office (GAO) found that "hospitals and physicians incur and pass on additional expenses that directly or indirectly relate to medical liability. An example of these costs include insurance premiums, contributions to self-insurance trust funds, uninsured losses, liability-related administrative costs and defensive medicine – "medical treatment that would not be provided if there were no threat of being sued."[10]

Researchers long have looked at the interdependence between liability reform and the health care system. For instance, in 1997, the California Legislature considered raising its cap on non-economic damages to $700,000 and indexing it to the consumer price index. However, lawmakers decided against such an increase after research conducted by LEGG, Inc. concluded that raising the cap would adversely affect the delivery of care throughout the entire system.[11]

Rising premiums and the elimination of liability coverage are major areas of concern. However, defensive medicine also has a direct impact on costs. In a 1996 study, researchers discovered that malpractice tort reforms, particularly "direct" reforms such as caps on non-economic damages, can reduce total medical expenditures between 5 percent and 9 percent per year without adverse consequences for health outcomes.[12] Using this statistical model, the U.S. Department of Health and Human Services concluded in a 2001 study that these reforms would save $60 billion to $108 billion in total health care costs each year.[13] These are real savings that could lower the cost of health care and improve access to affordable health insurance.

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[9]*Fein v. Permanente Medical Group* (1985) 38 Cal.3D 137-. 158-159. App.dism., 474 U.S. 892 as cited in the *Medical Injury Compensation Reform Act of 1975 (MICRA) Compensation Manual VI*, by Horitz and Levy.

[10]GAO, "Medical Liability: Impact on Hospital and Physician Cost Extends Beyond Insurance, September 1995.

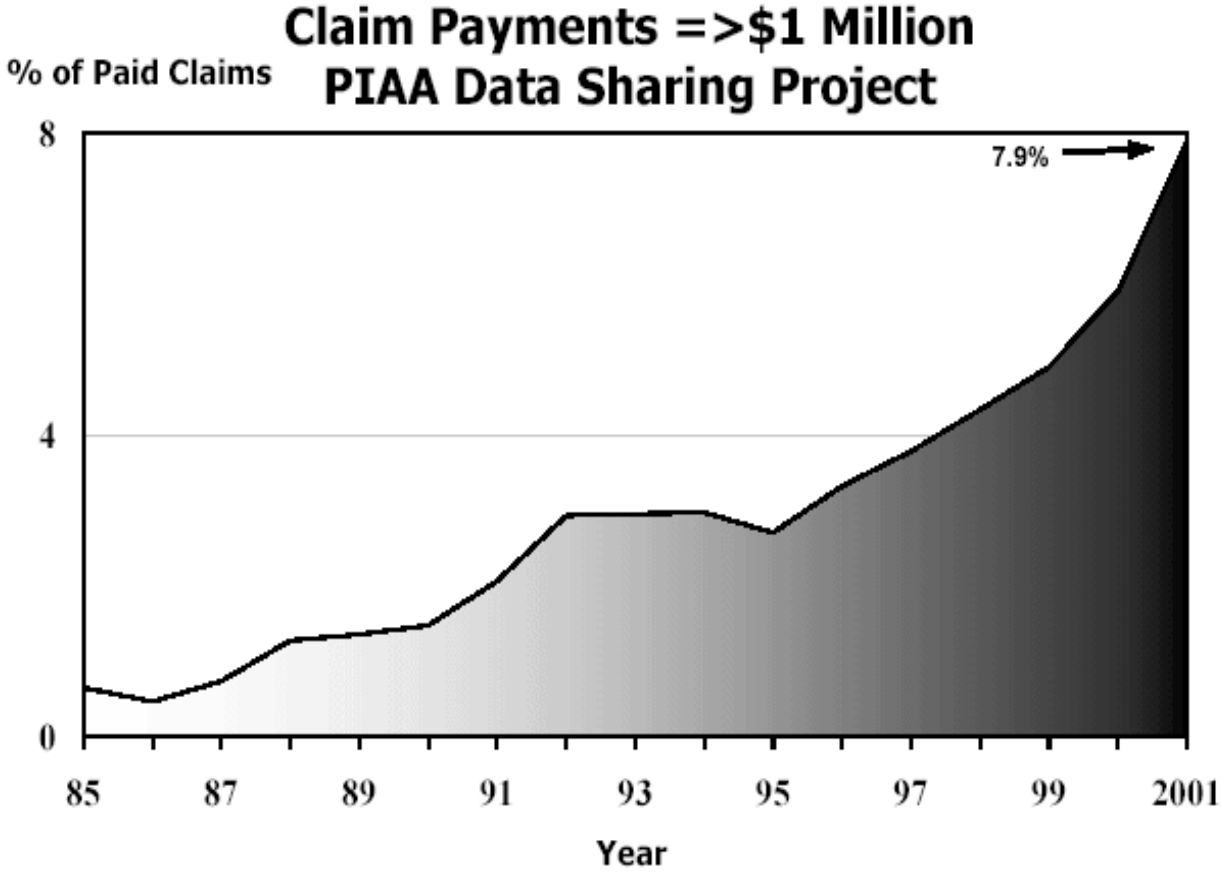
[11]"California MICRA Reforms: How Would a Higher Cap on Non-Economic Damages Affect the Cost of and Access to Health Care?", LEGG, Inc., Fall 1998.

[12]"Confronting the New Health Care Crisis." n. 28, citing Kessler, D.; McClellan, M., "Do Doctors Practice Defensive Medicine," *Quarterly Journal of Economics*, 111(2): 353-390, 1996.

[13]"Confronting the New Health Care Crisis."

What's the Difference between 1970s Crisis and Today's?

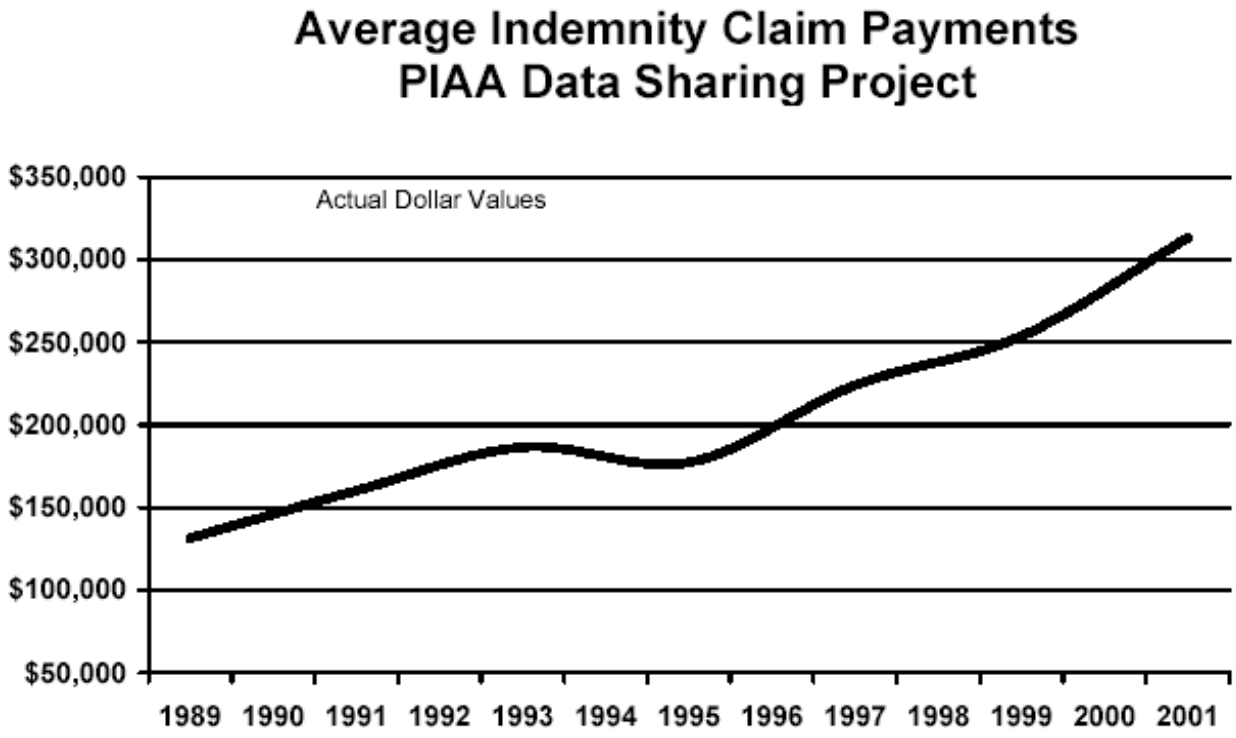
While today's crisis is reminiscent of the 1970s, one significant difference is the increase in large jury awards. It is true that the number of *new* malpractice claims has declined since 1995.[14] According to the Physician Insurance Association of America (PIAA), however, it is the amount paid per claim and its unpredictable size that brings new challenges for the liability insurance system. The PIAA Data Sharing Project found that the percentage of claims in excess of $1 million increased nearly four-fold between 1991 and 2002 (see chart).[15]



[14]National Association of Insurance Commissioners, 2000.

[15]PIAA Data Sharing Project, May 2002.

The Data Project also discovered an increase in the average malpractice indemnity payment – i.e., money paid to the claimant. The average indemnity payment in 2001 was more than $310,000 – a 60-percent increase in the last five years (see chart).



*Per defendant - many claims have more than one defendant

**Data reported for year 2000 incomplete at time of analysis.

Impact on Patient Care

The PIAA Data Sharing Project represents two disturbing trends, but none is more troubling than the direct impact on patients and their families. Rising premium costs and the termination of liability coverage in some areas have forced many providers to relocate, retire, or curtail certain services. The following anecdotes tell the story:

- The Copper Queen Community Hospital in Bisbee, Arizona, closed the town's only maternity ward due to higher liability premiums (December 2001). Today, expectant mothers must drive more than a half hour to the nearest town to deliver their babies.

- The University Medical Center in Las Vegas, Nevada, closed its Level 1 Trauma unit for 10 days due to exorbitant premium increases for its trauma surgeons (July 2002).

- Seventy-two percent of Pennsylvania doctors have deferred the purchase of new equipment or the hiring of new staff due to increased medical liability costs (Pennsylvania Medical Society survey, 2001).

- Eleven out of 21 Mississippi obstetricians terminated service in four rural counties (Mississippi Hospital Association, 2002).

- The Bacon County Hospital, an 80-bed hospital in Alma, Georgia, was forced to take out a loan to cover a liability premium that more than tripled in cost (*Atlanta Business Chronicle*, March 25, 2002).

- Alabama's Atmore Community Hospital closed its maternity ward, in part because the annual malpractice insurance for its obstetrician jumped from $22,000 to $88,000 in one year (July, 2002).

- At Frankford Hospitals in Northeast Philadelphia and Bucks County, all 12 orthopedic surgeons stopped practicing after their malpractice rates nearly doubled to $106,000 each for 2001 (*Philadelphia Inquirer,* 2001).

Possible Solutions

Republicans are committed to assuring patients have access to the health care they need through controlling increased costs and placing reasonable limits on medical litigation. The following set of principles would provide appropriate financial relief to those who are injured and improve access to quality health care:

- ✓ Set sensible limits on non-economic damages to help restrain malpractice premium increases while ensuring unlimited economic compensation for patients injured by negligence.

- ✓ Reserve punitive damages for cases that justify them.

- ✓ Allow providers to make judgement payments over time rather than in one lump sum.

- ✓ Assure claims are filed within a reasonable time period.

- ✓ Inform juries when additional payments for injuries have occurred.

[Please note: RPC will issue additional papers concerning the medical liability crisis.]

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